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J. FRANCISCO CHAVEZ *vs.* UNITED STATES.

REPLY BRIEF OF APPELLANT.

F. W. CLANCY,
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LAW REPORTER PRINT.

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In his original brief appellant took the position that, from the date of the regulations of 1828 to the time of the American occupation in 1846, no governor of New Mexico, except Manuel Armijo, made any grants of land, and that the uniform and usual course of proceeding showed that the territorial deputation, or departmental assembly, was the sole granting authority as to lands. In support of this, there was submitted a condensed statement of the substance of a great many of the Mexican archives and of proceedings of the deputations and assemblies now preserved in the office of the surveyor-general for New Mexico.

In an attempt to meet this and to break the force of the showing as to the contents and effect of the records of the former government, counsel for the appellee have filed a "Supplemental Brief and Abstract of Archives." The abstract has been prepared by Mr. W. M. Tipton, and can undoubtedly be relied upon as correct as far as it goes. The principal criticism to be made on his work is that he uses the word "grant" indiscriminately, whether describing a mere allotment under a previous grant, a license to occupy and cultivate, or a complete alienation of a part of the public

domain. This is misleading and has evidently misled counsel for the government, who, in their effort to show that there was no uniformity of procedure as to the granting of lands in New Mexico, but, on the contrary, great confusion and uncertainty, and unwarranted assumption of authority by different officials, class everything in the abstract as grants, and make an enumeration, at pages 4 to 6 of their supplemental brief, which certainly seems to show a most disorderly state of things. Examination will disclose that this impression is not well founded in fact, and that there is practically nothing shown by the abstract of archives seriously to affect the validity of appellant's position. As briefly as possible it will be shown herein how erroneous are the conclusions of counsel for appellee.

In that abstract are set out 101 documents or records, of which counsel are careful to state that Nos. 1 and 51 are not "grants." This leaves us 99 "grants," made during the period from 1821 to 1846. I intend to confine this examination to the period covered by appellant's original brief, from November 21, 1828, to July, 1846. This requires us to begin with No. 34 in the abstract presented by the government. Excluding No. 51, this leaves 67 things which the appellee styles "grants." Appellant uses this word to mean the primary giving of title to public land, and it should be so understood throughout this argument.

From the 67 "grants" must be eliminated three, Nos. 38, 62 and 94, as having no possible bearing on the question under discussion. Neither was made by New Mexican authorities. No. 38 was made in 1832, by the State of Coahuila and Texas, and No. 94 by the State of Texas in 1844, and both, so far as New Mexico is concerned, were acts of unwarrantable usurpation. They certainly can throw no light on the question of the condition of the law in New Mexico as to alienation of the public domain. No. 62 is a grant by the State of Chihuahua of land certainly belonging to that State at that time, and because the land falls

within the limits of the territory ceded to the United States in 1854, and is now in New Mexico, can not make this a New Mexican grant.

Of the 64 remaining, 25 are clearly not grants at all, and at least four others are doubtful. The 25 which are not grants are Nos. 42, 46, 48, 49, 50, 54, 55, 59, 63, 68, 71, 72, 73, 74, 75, 79, 80, 81, 82, 84, 85, 86, 87, 97 and 101. Of these, Nos. 42, 71 and 101 are proceedings by judicial officers under the mining ordinances, as to registration of mines and the use of land about the mines in connection with their operation. The officers were acting within their lawful powers, but they did not attempt to confer any title to the land, nor could they lawfully have done so. These are no more grants than are mining locations under United States laws.

The remaining 22 of the 25 are, all but one, No. 48, allotments, by prefects and alcaldes, under grants previously made, and do not purport to be transfers of the original government title. Fourteen of them are of land in the Mora grant, and they are Nos. 46, 49, 50, 54, 72, 73, 79, 80, 81, 82, 84, 85, 86 and 87.

Three of them, Nos. 59, 68 and 75, are of land at Galisteo, within what is commonly called the Eaton grant.

No. 55 is of land within the grant of Las Vegas, but Mr. Tipton says:

> "It does not appear that this grant was intended as an allotment under the grant to the town of Las Vegas, but rather it was made by the exercise of that power of control and disposition over lands assigned to a town, but undisposed of, which was frequently employed under the Mexican government in New Mexico, where the granting of lands within the out-boundaries which had been assigned to a town or community would not result in injury to the latter."

It must not be forgotten that this was under the Mexican, not the Spanish, government.

No. 63 is an allotment, in the language of Mr. Tipton, "made under some order emanating from a source not known."

No. 97 is an allotment of land under the grant of the State of Chihuahua, already referred to as No. 62.

No. 74 is an allotment of land under the Anton Chico grant.

No. 48, although called a grant by Mr. Tipton, is not so, as will be seen by reference to the original Spanish, at page 6 of *Ex. Doc. No. 2, Senate, 43d Cong., 2d Session*, where it appears that the three "grantees" were merely given a license or permission to occupy and use without any attempt to confer title. The translation in the same document is inaccurate in rendering the word "posession" as "grant."

The four doubtful "grants" are Nos. 57, 60, 61 and 96, and of these Nos. 57, 60 and 61 are, by counsel for appellee, classed as mere allotments under previous grants. Any doubt should, of course, be resolved in favor of the regularity of official action, and they should not be considered as attempts at unlawful "grants," if this can be avoided. No. 96, in the opinion of Mr. Tipton, is possibly an allotment under the Eaton grant.

We are now left with thirty-five of the 67 "grants" with which we started. Of these, fourteen were made by Governor Manuel Armijo—Nos. 52, 53, 58, 64, 66, 76, 77, 78, 90, 91, 92, 93, 99 and 100. Appellant has conceded that this governor made grants, but insists there is no clear proof that any other governor did so between 1828 and 1846, and even he did not, until October, 1837, after the adoption of the constitution of 1836.

Eliminating these fourteen Armijo grants, we have 21 left for consideration. Of these it is conceded by counsel for appellee at page 4 of their supplemental brief, that ten were made by the territorial deputation or departmental assembly—Nos. 35, 36, 37, 39, 40, 44, 88, 89, 95 and 98. To these should be added No. 83, as will be seen by reference to what

Mr. Tipton says at pages 59–60, and to page 30 of appellant's original brief.

There are four other grants—Nos. 41, 43, 45 and 47—which are alleged by counsel for appellee to have been made by political chiefs. Of these, No. 43, the Tajique grant, was a temporary order for possession, made during a recess of the territorial deputation; No. 45, the Mora grant, presents no definite, certain proof as to who made the grant; and No. 47 was probably an order for a new possession under an old grant.

See appellant's original brief, pp. 28–30, 31–32.

The evidence as to who made the grant in No. 41, the Cubero case, is oral, the grant papers having been lost for many years. Witnesses testified that they had a grant from Sarracino, the political chief, but this is quite consistent with the grant having been regularly made by the deputation, and an order having been given by the political chief that possession should be delivered in accordance with the action of the deputation, as was done in other cases.

There is no satisfactory proof that these four, or any other grants, except Armijo's, were made by political chiefs or governors.

We are thus brought to the consideration of only six out the sixty-seven "grants" with which we started, as evidence of the lawless state of grant-giving, upon which the argument of the government depends. They are Nos. 34, 56, 65, 67, 69 and 70.

It must be admitted that four of these, Nos. 56, 65, 67 and 69, indicate some usurpation of authority on the part of prefects—an authority distinctly claimed by the Prefect Archuleta, and as distinctly repudiated by the governor, as will appear by reference to Archive 801, the substance of which is stated at page 17 of appellant's original brief, and from which it will be seen that the granting of lands belonged to the departmental assembly. The record in No.

56 is quite instructive, and tends to support appellant's position, as will be seen by reference to pp. 27–8 of his original brief. In that case, the grantees were given possession by a prefect in 1839. In 1845, Serafin Ramirez, an officer of the government and presumably possessed of some knowledge of the law, having been employed as attorney by the settlers, evidently discovering the bad condition of their title, petitioned the governor for an approval of the grant to be made in conjunction with the departmental assembly. He refers to the law of 1824, but not to the regulations of 1828. The assembly acted on the petition, and the governor, three days later, approved and revalidated the grant. The assembly appears to be the primary power. Even in this case it is not clear that the act of the prefect was the beginning of the title as the grantees in their original petition make an obscure allusion to earlier proceedings which seems to indicate a grant earlier than 1820.

Appellant's Original Brief, pp. 27–8.
Report No. 457, H. R., 35th Cong., 1st Sess., pp. 210, 215, 226.

As to No. 34, it must be conceded that, so far as the papers disclose, there appears to have been an extraordinary and unwarranted exercise of power by the alcalde of Taos. The papers can be found on file in this court, in the case of Julian Martinez *vs.* United States, which was No. 156 on the calendar of the October, 1898, term. We should bear in mind, however, the difficulty of understanding all of the official actions under the former government.

So also as to No. 70, the original papers would seem to justify the belief that a justice of the peace far exceeded his lawful authority in undertaking to make a grant of land; but this is not entirely certain, as it appears from the record in the case, in this court, (*May Hays vs. United States, No. 19*), that there is positive testimony that a grant was made by the Governor, Manuel Armijo, and the justice, who

acted, merely delivered possession under the orders of the governor.

Still, we may concede that 34, 56, 65, 67, 69 and 70 were made without authority, without affecting appellant's position and without leading to the conclusion that any such condition of anarchy prevailed in New Mexico about the granting of lands as is set out by counsel for the United States. Nos. 56 and 65 were made by the prefect, Antonio Sandoval, and Nos. 67 and 69 by the prefect, Archuleta. These were the acts of but two men. Their authority to make such grants was distinctly denied, as we have already seen, in the letter of Miranda, of 1842, to Archuleta (*Archive 801*); and in No. 56 the error was repaired by obtaining a decree of the departmental assembly, as hereinbefore stated.

Thus we have, at the utmost, only four officials—two prefects and two alcaldes—clearly exceeding their authority in this regard, instead of the bewildering swarm of unauthorized performers pictured at pages 4–5 of the supplemental brief for the United States.

Against this, we have, as pointed out in appellant's original brief, the continuous, unfaltering assertion of this power by the deputation and assembly, not only in the grants which they actually made, but in a great many other instances where petitions were acted upon unfavorably; the distinct recognition by the governors of the possession of this power by the deputation or assembly, as shown in Archives 801, 901, 918, 921, 1309 and 1322; in the cases of the grants known under the names of Tajique, Tierra Amarilla, San Pedro, Cañon del Agua and Gotera; and the opinion of the Licenciado Barreira, in 1832, that the giving of lands is an exclusive attribute of the territorial deputation.

No. 51, in the abstract, appears to be of importance, as counsel for appellee have printed it twice in their briefs. It is an unsigned draft of a grant dated March 13, 1837, and counsel declare that it is sufficient to to show that the Colonization Law of 1824, and the regulations of 1828, were

in force in New Mexico. Appellant insists that all it shows is that the existence of the law and regulations was known in New Mexico, but not that the regulations were in force. On the contrary, the fact that this grant, carefully drawn to conform to the regulations, was never actually executed, would seem to make the paper evidence against the contention of appellee, especially when coupled with the facts that in no other document in the Mexican archives, as I believe, is there any mention of the regulations, although the law of 1824 is referred to a number of times, and that no grant was ever made in New Mexico in which there was more than a remote approach to conformity to those regulations.

Attention is again called to the fact that in the Mexican archives is to be found a great mass of proof of the correctness of appellant's position, a considerable portion of which is set out in appellant's original brief. There is no lack of harmony between that brief and Mr. Tipton's abstract. Each contains matter not in the other, but there is no substantial disagreement. Indeed, it ought to be said that the condensation of archives set out in appellant's brief was submitted to, corrected in some details, and approved by Mr. Tipton, before it was printed. This was done in pursuance of an understanding with the special counsel who appears in these cases, in order that he should be assured by, probably, the best authority in the country, of the accuracy of that which appellant desired to submit.

Counsel for appellant has marked on the margins of the pages of his original brief, opposite the various summaries of the Mexican archives, numbers corresponding to those used in Mr. Tipton's abstract, in order to indicate the relation between those summaries and the real grants set out in the abstract. It will be noticed that many of those summaries have no numbers opposite, and that they relate to matters not set out in the abstract.

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